

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of EDWARD J. DAGNEY and U.S. POSTAL SERVICE,  
POST OFFICE, Wildwood, NJ

*Docket No. 98-1279; Submitted on the Record;  
Issued October 20, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether appellant established that he has greater than a 25 percent permanent impairment of the right upper extremity, for which he received a schedule award.

On December 16, 1989 appellant, then a 62-year-old letter carrier, slipped on an icy surface while in the performance of duty and sustained an injury to his right shoulder. The Office of Workers' Compensation Programs accepted appellant's claim for a right shoulder sprain. On May 9, 1990 appellant filed a claim for a schedule award. In support of his claim, appellant submitted a May 20, 1991 report from Dr. Ronald Goldberg, an osteopath, who determined that appellant had a 50 percent permanent impairment of the right upper extremity due to loss of range of motion and loss of strength.<sup>1</sup>

The Office subsequently referred appellant for a second opinion evaluation with Dr. Ralph Cavalier, a Board-certified orthopedic surgeon. In reports dated April 18 and November 12, 1993, Dr. Cavalier indicated that appellant had a 15 percent disability in his right shoulder. Upon reviewing the record, including Dr. Cavalier's reports, the Office medical adviser determined that appellant had a seven percent impairment of his right arm. Accordingly, on May 3, 1994, the Office granted appellant a schedule award for a seven percent permanent loss of use of his right arm. The award covered a period of 21.84 weeks from September 15, 1993 to February 14, 1994.

Appellant subsequently requested a hearing, and in a decision dated January 26, 1995, the Office's hearing representative set aside the May 3, 1994 schedule award. The hearing representative explained that the Office medical adviser's opinion was speculative inasmuch as it

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<sup>1</sup> On June 24, 1991 Dr. John M. Cuckler, a Board-certified orthopedic surgeon, reviewed Dr. Goldberg's findings and concurred with his 50 percent impairment rating. Dr. Cuckler initially examined appellant in March 1990 and diagnosed a right rotator cuff tear based, in part, on a February 14, 1990 magnetic resonance imaging scan. Appellant's treating physician, Dr. Joseph Zebro, an osteopath, also noted his agreement with Dr. Goldberg's May 20, 1991 findings.

was based upon Dr. Cavalier's opinion, which did not clearly provide range of motion data. Consequently, the claim was remanded for further development.

After several unsuccessful attempts to secure a second opinion evaluation,<sup>2</sup> the Office referred appellant for another examination with Dr. Cavalier. In a report dated June 8, 1995, Dr. Cavalier explained that he found no clinical evidence of a permanent physical impairment of the right arm. Dr. Cavalier's June 8, 1995 report included appropriate measurements regarding appellant's range of motion. The Office medical adviser reviewed Dr. Cavalier's most recent findings, and in a report dated June 9, 1995, concluded that appellant had a seven percent impairment due to loss of internal and external rotation of the right shoulder.

By decision dated June 9, 1995, the Office found that appellant was not entitled to an increased schedule award inasmuch as the medical evidence established that he had only a seven percent impairment due to loss of function of his right arm. However, this decision was subsequently set aside by the Office's Branch of Hearings and Review. In a decision dated November 4, 1996, an Office hearing representative explained that a conflict in medical opinion existed between Dr. Goldberg's May 20, 1991 report and Dr. Cavalier's June 8, 1995 report. Consequently, the case was remanded for an impartial medical evaluation to resolve the conflict.

Appellant was subsequently referred to Dr. Marc L. Kahn, a Board-certified orthopedic surgeon. In a report dated December 19, 1996, he diagnosed a rotator cuff tear and found that appellant had a 24 percent permanent impairment of his right arm due to loss of range of motion and shoulder weakness. In a supplemental report dated January 9, 1997, Dr. Kahn provided further explanation for the portion of his impairment rating attributable to shoulder weakness. He noted that appellant's weakness was due mostly to the axillary nerve and that appellant's strength was two grades below normal. Dr. Kahn further explained that, while there was a motor deficit, there was no sensory deficit. The Office medical adviser reviewed his findings and in a report dated January 15, 1997, Dr. Kahn concluded that appellant had a 9 percent impairment due to loss of range of motion and a 17.5 percent impairment due to a motor deficit involving the axillary nerve, for a total combined impairment of 25 percent.

Having previously issued a schedule awarded for a 7 percent impairment, the Office, by decision dated March 11, 1997, awarded appellant an additional 56.16 weeks of compensation, which represented an 18 percent permanent impairment of the right upper extremity. As such, appellant's combined schedule awards represented a 25 percent impairment of his right upper extremity for a total of 78 weeks of compensation.

On March 20, 1997 appellant requested an oral hearing, which was held on October 27, 1997. In a decision dated and finalized on December 29, 1997, the Office hearing representative affirmed the March 1997 schedule award. The hearing representative explained that the impartial medical examiner's reports resolved the conflict regarding the extent of appellant's permanent impairment and that the Office medical adviser properly calculated the extent of appellant's impairment based upon the information provided.

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<sup>2</sup> Between February and May 1995, the Office attempted to secure a second opinion examination from at least two other physicians. However, upon receipt of the physicians' respective reports, the Office medical adviser determined that there was insufficient information to render an opinion regarding the extent of appellant's impairment.

The Board has duly reviewed the case record in the present appeal and finds that appellant has a 27 percent permanent impairment of his right upper extremity.

Section 8107 of the Federal Employees' Compensation Act<sup>3</sup> sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993) as an appropriate standard for evaluating schedule losses, and the Board has concurred in such adoption.<sup>4</sup>

In the instant case, the Office determined that a conflict of medical opinion existed based on the reports of Drs. Goldberg and Cavalier, and therefore, the Office properly referred appellant to an impartial medical examiner.<sup>5</sup> In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>6</sup> The Board finds that the impartial medical examiner's reports dated December 19, 1996 and January 9, 1997 are sufficiently well rationalized and based upon a proper factual background. Dr. Kahn not only examined appellant, but also reviewed appellant's medical records. He also reported accurate medical and employment histories. Accordingly, the Office hearing representative properly accorded determinative weight to Dr. Kahn's findings. The Office medical adviser, however, erred in his calculation regarding appellant's impairment due to loss of range of motion.

While the Office medical adviser properly calculated appellant's impairment due to loss of flexion, abduction, internal rotation and extension,<sup>7</sup> he failed to recognize that Dr. Kahn's measurements with respect to loss of adduction and external rotation similarly demonstrated a level of impairment. Dr. Kahn measured appellant's external rotation at 35 degrees. In accordance with Figure 44 at page 45 of the A.M.A., *Guides*, this corresponds to a one percent impairment. With regard to appellant's loss of adduction, Dr. Kahn noted that appellant had "15 degrees on the right." According to Figure 41 at page 44 of the A.M.A., *Guides*, 15 degrees of

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<sup>3</sup> 5 U.S.C. § 8107.

<sup>4</sup> *James J. Hjort*, 45 ECAB 595 (1994).

<sup>5</sup> The Act provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994); see *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

<sup>6</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>7</sup> The Office medical adviser determined that appellant had a nine percent impairment due to loss of range of motion. Based on the measurements provided by Dr. Kahn in his December 19, 1996 report, the Office medical adviser properly calculated a four percent impairment due to loss of flexion, a one percent impairment due to loss of abduction, a two percent impairment due to loss of internal rotation and a two percent impairment due to loss of extension. These calculations are in accordance with Figures 38, 41 and 44 of the A.M.A., *Guides* at pages 43 through 45.

adduction represents a one percent impairment. Thus, the Office medical adviser erred in his determination regarding the extent of appellant's impairment due to loss of range of motion. Appellant's total impairment due to loss of range of motion is 11 percent, rather than 9 percent as calculated by the Office medical adviser. This 11 percent impairment, when combined with appellant's 17.5 percent impairment due to motor deficit,<sup>8</sup> represents a total impairment of 27 percent pursuant to the Combined Values Chart at page 322 of the A.M.A., *Guides*. Appellant has failed to provide any probative medical evidence that he has greater than a 27 percent impairment of his right upper extremity.<sup>9</sup> Accordingly, the Office's decision will be modified to reflect a 27 percent impairment rating of the right upper extremity. As such, appellant is entitled to an additional 6.24 weeks of compensation.

The decision of the Office of Workers' Compensation Programs dated and finalized on December 29, 1997, is hereby affirmed as modified to reflect a 27 percent impairment of appellant's right upper extremity.

Dated, Washington, D.C.  
October 20, 1999

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

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<sup>8</sup> The Office medical adviser's calculation of a 17.5 percent impairment due to a motor deficit involving the axillary nerve is consistent with the findings reported by Dr. Kahn and is in accordance with Tables 12 and 15 of the A.M.A., *Guides* at pages 49 and 54.

<sup>9</sup> The Act provides that, for a total or 100 percent loss of use of an arm, an employee shall receive 312 weeks of compensation. 5 U.S.C. § 8107(c)(1). In the instant case, appellant does not have a total or 100 percent loss of use of his right arm, but rather a 27 percent loss. As such, appellant is entitled to 27 percent of the 312 weeks of compensation, which is 84.24 weeks.